IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No.

CHARLES LONDONER,
Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Courts Below

The Trial Court rendered no opinion. The opinion of the Circuit Court below (R. 899-918), rendered May 28, 1943, is still unreported.

II

Jurisdiction

Reference is respectfully had to subdivision II of the petition (p. 6, *supra*), which is herewith incorporated as an integral part hereof on the question of jurisdiction.

III

Statement of the Case

The statement of the case made in the petition herein under "I" (p. 1, *supra*) is, in the interest of brevity, incorporated herewith as an integral part hereof.

IV

Specification of Errors

A. It was error for the Court below to sustain a conviction based upon the combination in a single indictment, under a single count, of several separate and distinct conspiracies and to offer proof thereunder when such conspiracies differed as to content and personnel, one of which, even if proved, constituted no crime, one of which was abandoned, and one of which failed for complete absence of proof.

B. It was error for the Court below to sustain the conviction when the variance between the allegations of the indictment and the proof thereof was substantial and prejudicial, hence fatal, and further because

1. The jury may have applied the evidence cumulatively and without discrimination, whereas substantial parts thereof related to conspiracies with which this petitioner had not even been named and substantial portions thereof related to conspiracies which, as a matter of law, constituted no crime or in respect whereof there was a failure of proof.

2. The issues, because of the mentioned impropriety of joinder, were so inextricably interwoven as to confuse the jury.

C. It was error for the Court below to sustain the conviction because the Trial Court was grossly unfair in its conduct of the trial by reason of its manifest partisanship, demonstration of open contempt for the defendants and their counsel, usurpation of the prerogatives of counsel, unwarranted interference with the conduct of the defense, and clear exhibition of bias in favor of the Government and prejudice against the defendants.

D. It was error for the Court below to sustain the conviction because the charge of the Trial Court was obscure, confusing, failed to marshal any of the evidence and failed to provide a basis for the intelligent guidance of the jury.

E. It was error for the Court below to sustain the conviction because of the insufficiency of evidence to connect this petitioner with any of the alleged conspiracies.

F. It was error for the Court below to sustain the conviction upon a theory newly evolved upon appeal and upon which the prosecution of the cause had not proceeded.

G. It was error for the Court to sustain the conviction for a conspiracy where proof was offered as to commission of the substantive offense.

Statutes and Regulations Involved

The statutes and regulations involved are set forth in the appendix.

Summary of Argument

I. There was a misjoinder of several, separate and distinct conspiracies, a fatal variance in the proof and an attempt upon appeal to sustain the conviction upon a theory upon which the case was not tried.

II. Mere knowledge or suspicion of knowledge by a manufacturer as to contemplated illegal use of the subject of sale by a buyer does not make him a conspirator with such buyer.

III. The Trial Court was unfair and its charge was wholly inadequate.

IV. Proof of the commission of the substantive offense does not warrant conviction for a conspiracy.

ARGUMENT

I

There was a misjoinder of several, separate and distinct conspiracies, a fatal variance in the proof and an attempt upon appeal to sustain the conviction upon a theory upon which the case was not tried.

In the opening by the Government's counsel at the trial a three-pronged conspiracy was sought to be established revolving about allegedly prohibited trafficking in narcotics: 1. The synthetic making of morphine; 2. The extraction of narcotics from tax-exempt preparations; 3. The diversion of opium from permissible channels of use.

The Government conceded that this petitioner, Charles Londoner, was in nowise concerned with, and was not even named in connection with, the first two phases, i. e., "synthesis" and "extraction" (R. 24). The majority opinion of the Circuit Court of Appeals conceded that "synthesis" would, in any event, have constituted no crime (R. 900) and that "extraction" had been abandoned (R. 900). The opinion further conceded that because of the absence of a vital link in the chain of evidence, in that there was no showing whatever that the lead and opium wash sold by the Leading Drug Company, with which this petitioner

was identified (R. 561-563), had ever been returned to the primary seller, that the third phase of the alleged conspiracy (i. e., "diversion") had failed of proof (R. 901).

The conviction, therefore, of this petitioner was sought to be sustained upon, in effect, a new conspiracy which had not even been touched upon in the Government's opening at trial and upon which theory the trial had not been prosecuted, i. e., that this petitioner, with others, had conspired to subject lead and opium wash to non-medicinal use. That such theory was of novel impression so far as the appeal below was concerned is apparent from the majority opinion itself (R. 901). This was a challenge which petitioner was never called upon to meet at the trial, but one which was raised by the Government for the first time in its responsive brief to that of the appellants in the Circuit Court of Appeals when the innate weakness of the record, as providing a basis for sustaining conviction on any of the first three mentioned conspiracies, became manifest. Indeed, Judge Frank, in his dissenting opinion (R. 913), says: "* * * when, as the evidence disclosed, there were in fact three distinct alleged conspiracies * * * *", referring to the three hereinabove mentioned.

No reference to this new theory is contained either in the Government's opening, the trial or the Judge's charge. Neither the prosecution nor the Trial Court took cognizance whatever of this theory, and yet we are asked to assume that despite the absence of reference thereto in the charge, that the jury unwittingly and by some prescience, with which neither Court, prosecutor nor counsel was endowed, stumbled upon the correct basis for conviction.

In view of the foregoing, the improper joinder of the several, separate and distinct conspiracies into a single count, and the offer of proof thereunder, was particularly fraught with prejudice. The jury could hardly be expected, particularly where the charge of the Court was obscure, confusing, failed to marshal the evidence or to discuss

the rules of law applicable thereto, to determine with nicety and precision the exact point at which one conspirator withdrew, another entered, the overt act which would bind the one committing the same as well as the others who had not withdrawn, the abandonment or termination of one conspiracy and the commencement of another, particularly when some twenty defendants were involved, the trial was protracted, and the alleged conspiracies differed as to content and personnel.

The variance was conceded by the majority opinion (R. 902). The danger of joinder where, as the majority opinion acknowledged, the conspiracies were "separate not only in personnel but in content" (R. 902), is clearly recognized by the majority of the Court below (R. 902), yet a rule of expediency was adopted by a majority of the Court (R. 904), strongly challenged, however, in the dissenting opinion throughout its text. The case of *McCandless* v. *U. S.* (8th Cir.), 298 U. S. 342, is at variance with the view of the Court below on this point.

See also:

Bruno v. *U. S.*, 308 U. S. 287.
Ft. Dodge Hotel v. *Bartlett*, 119 Fed. (2d) 253.

The majority of the Circuit Court of Appeals betrayed confusion of their own, for notwithstanding the affirmance of the conviction as to the appellant Rudy, upon a rehearing by that appellant the affirmance of his conviction was rescinded, his conviction was reversed and his indictment dismissed (R. 932).

Certainly the force of the declaration of the dissenting opinion, touching upon the impropriety of the joinder in the case at bar, was, in the light of the preceding observations, fully warranted: "My colleagues' ruling here is the farthest north of the McElroy case to be found in the books" (R. 916).

These cases support this petitioner's contention that joinder in this case was fatal:

Berger v. *U. S.*, 295 U. S. 78.
Marcante v. *U. S.*, 49 Fed. (2d) 156.
U. S. v. *Wills*, 36 Fed. (2d) 855.
Tellman v. *U. S.*, 67 Fed. (2d) 716.
U. S. v. *Groves*, 122 Fed. (2d) 87.
U. S. v. *Silva*, 109 Fed. (2d) 531.
Wyatt v. *U. S.*, 23 Fed. (2d) 791.
Terry v. *U. S.*, 7 Fed. (2d) 28.
U. S. v. *McConnell*, 285 Fed. 164.

II

Mere knowledge or suspicion of knowledge by a manufacturer as to contemplated illegal use of the subject of sale by a buyer or consumer does not make him a conspirator with such buyer.

It is settled law that the seller and buyer cannot be indicted for conspiracy to subject the commodity sold to illegal use unless the seller not only joins in such illegal use but has a definite stake therein:

Falcone v. *U. S.*, 311 U. S. 205.
U. S. v. *Peoni*, 100 Fed. (2d) 401.
U. S. v. *Koch*, 113 Fed. (2d) 982.
Young v. *U. S.*, 48 Fed. (2d) 26.
U. S. v. *Dickerson*, 18 Fed. (2d) 887.
Morrison v. *Calif.*, 291 U. S. 82.

The landmark of those decisions is *Falcone* v. *U. S.*, 311 U. S. 205. The majority opinion of the Court below is sought to be distinguished from the *Falcone* case, upon rather narrow grounds, with respect to the druggists (R. 909). This petitioner was not a druggist. The firm with

which he was identified was a manufacturing chemist (R. 899). The Circuit Court of Appeals sought to sustain the conviction of this petitioner, when all the other grounds failed, upon the theory that he had conspired to sell lead and opium wash for non-medicinal purposes to other than registered dealers. There is no claim that this petitioner sold to others than registered dealers and the majority opinion below concedes that he kept proper records (R. 907). There is, therefore, no basis for the lower Court's conclusion with respect to this petitioner.

The petitioner's sales, or rather those of the firm with which he was identified, were legal. If, therefore, petitioner is sought to be held it must be upon a theory which would hold him chargeable, together with the buyer, because of the latter's allegedly criminal resale. The firm with which petitioner was connected was a manufacturing chemist. The *Falcone* case, *supra,* held that the seller could not be joined in a conspiracy with the manufacturer. If it is indeed illegal for a retail druggist to sell lead and opium wash to a consumer for non-medicinal use, how can the manufacturing chemist, who, through a jobber, sold the retail druggist, be joined in a conspiracy with the druggist to resell it merely because the druggist intended a criminal resale?

However viewed, the majority opinion below resolves itself into an essential holding that mere quantity sales permits of an inference of impropriety of intended use of the commodity when resold, a holding directly at variance with the Falcone decision. Despite the seeming departure of the Circuit Court of Appeals from the Falcone holding, the Court nevertheless enunciated its readherence thereto in its opinion in the case of *United States* v. *Zeuli,* unreported, but decided August 2, 1943, which was cited in the per curiam opinion upon the Court's reversal of its own judgment of conviction of the defendant Rudy upon the latter's application for rehearing (R. 932).

Retail druggists, who, through wholesalers or jobbers had been buying "a general line of pharmaceuticals from the Leading Drug Company (this petitioner's principal) for many years" inclusive of lead and opium wash (R. 169, 170, 173, 180, 261, 297, 303), purchased such wash through defendants Al N. Fox and Max Fox, drug jobbers, who placed the orders with the Leading Drug Company. Knowledge of the ultimate destination of the wash through resale by druggists to consumers could hardly be imputed to this petitioner, but even were there such knowledge it would be insufficient (see *Falcone* v. *U. S.*, 311 U. S. 205; *U. S.* v. *Peoni*, 2 Cir., 100 Fed. (2d) 401; *Linde* v. *U. S.*, 8 Cir., 13 Fed. (2d) 59 at p. 61; *U. S.* v. *Koch*, C. C. A. 2d, 113 Fed. (2d) 982, at p. 983; *Eckert* v. *U. S.*, C. C. A. 8th, 7 F. (2d) 257 at p. 258; *U. S.* v. *Crimmins*, C. C. A. 2d, 123 F. (2d) 271 at p. 272).

The brevity and peculiar pertinence of language from the case of *Young* v. *U. S.*, C. C. A. 5th, 48 Fed. (2d) 26, warrants quotation of the excerpt verbatim:

> "We are of opinion that this evidence was insufficient to prove the conspiracy alleged. McDaniel, the seller, could not have been a co-conspirator with Young and Coates, the purchasers, upon proof simply that he made sales to them; and in turn Young and Coates, whether acting individually or as partners, could not upon similar proof have been co-conspirators with those who purchased from them at retail. There must have been a conspiracy to do something unlawful after the sales were made in order to sustain the indictments * * *.
>
> There is no similar proof here, but the evidence stops with the sales. The conviction of the sellers cannot be sustained on the ground that they had knowledge of the intention of the purchasers to use the sugar and other articles in connection with the unlawful manufacture of liquor."

III

The Trial Court was unfair and its charge was wholly inadequate.

The joinder of several separate and distinct conspiracies differing as to content and personnel, the twenty defendants, the protracted nature of the trial, rendered the case complex. The majority opinion of the Court below states it well (R. 905 of opinion).

> "The charge did not tell the jury that these were the issues for them to decide; the judge merely read them the relevant sections from the statute and the regulations; and the wilderness of the resulting verbiage must have left them pretty much in the dark."

The charge (R. 779-801) was inadequate and hopelessly confusing. The evidence was not marshaled; no illustration of applicable rules of law was given. Far from clarifying existing confusion and providing intelligent guidance and discriminating judgment, the charge merely added to the welter of confusion and the jury were rendered utterly impotent to cope with the morass of testimony and evidence which had been thrown into the judicial hopper throughout a protracted conspiracy trial.

Such charge, particularly when considered with relation to the improper joinder, the variances, and the unfavorable conduct of the trial judge heretofore considered, assuredly deprived this petitioner of a fair trial (see *People* v. *Odell,* 230 N. Y. 481, 487-488; *Kreiner* v. *U. S.,* 11 Fed. (2d) 722, 731; *Owen* v. *Owen,* 22 Iowa 270; *U. S.* v. *Quick,* 128 Fed. (2d) 832, 835; *People* v. *Becker,* 210 N. Y. 274 at p. 307).

As Judge Frank in his dissenting opinion observed (R. 913):

> "In those circumstances, the least that the trial judge should have done was to aid the jury in his charge by differentiating the conspiracies. Not only did he not do so, but as my colleagues point out, his charge was not too enlightening."

The Trial Court had refused to accept written requests to charge (R. 779, 803-804). This may have accounted for the failure of the appellants to challenge, by making appropriate exceptions, the inadequacies of the Court's charge as given. Notwithstanding this the interests of justice require, in a proper case, that the charge be reviewed. The review of the charge may be urged under Title 28, United States Code, Section 391, which provides as follows:

> "All United States Courts shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the Courts of law. On the hearing of an appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

See also:

De Jianne v. *U. S.*, 282 Fed. 737.
Moore v. *U. S.*, 224 Fed. 95.
Keliher v. *U. S.*, 193 Fed. 8.

The unfairness of the Trial Court's conduct has been heretofore considered (pp. 4-5, *supra*) (see *Adler* v. *U. S.*, 182 Fed. 464, 472-473; *Frantz* v. *U. S.*, 62 Fed. (2d) 737).

IV

Proof of the commission of the substantive offense does not warrant conviction for conspiracy.

Proof of the commission of the substantive offense will not sustain a conviction for a conspiracy to commit such offense.

U. S. v. *Crimmins, C. C. A.* 2d, 123 Fed. (2d) 271 at p. 272.
Linde v. *U. S.*, 8 Cir., 13 Fed. (2d) 59 at p. 61.
U. S. v. *Zeuli,* C. C. A. 2d, unreported, decided August 2, 1943.
U. S. v. *Dietrich,* 126 Fed. Rep. 664.
U. S. v. *New York Central & H. R. R. Co.,* 146 Fed. Rep. 298.
U. S. v. *Sager,* 49 Fed. (2d) 725, 727, 728 (C. C. A. 2d).

The dissenting opinion of the Court below in great degree epitomizes the viewpoint of this petitioner. Reference is therefore had to the text of such opinion as well as to these cases cited in such dissent.

Mattox v. *U. S.*, 146 U. S. 140.
Wilmington Mining v. *Fulton,* 205 U. S. 60.
Schilling v. *Delaware & N. R. Corp.,* 114 Fed. (2d) 69.
Christian v. *B. M. R. R.,* 109 Fed. (2d) 103, 105.
Wiborg v. *U. S.*, 163 U. S. 632, 658.
U. S. v. *Atkinson,* 297 U. S. 157, 160.
Brasfield v. *U. S.*, 272 U. S. 448.
N. Y. C. R. Co. v. *Johnson,* 279 U. S. 310, 318.
Crawford v. *U. S.*, 212 U. S. 183, 194.
Van Gorder v. *U. S.*, 21 Fed. (2d) 939, 942.
Meadows v. *U. S.*, 82 Fed. (2d) 881, 884.
In re Barnett, 124 Fed. (2d) 1005.

U. S. v. *St. Pierre,* 132 Fed. (2d) 837, 849.
Bruno v. *U. S.,* 308 U. S. 287, 294.
Fort Dodge Hotel Co. v. *Bartelt,* 119 Fed. (2d) 253, 259.
McCandless v. *U. S.,* 298 U. S. 342, 347, 348.

CONCLUSION

In conclusion it is respectfully submitted that the questions involved herein have been demonstrated to be of sufficient importance to warrant the issuance by this Court of a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review its decision herein.

Respectfully submitted,

ABRAHAM S. ROBINSON,
Counsel for Petitioner.